

No. 15294
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

SAFEWAY STORES, INCORPORATED,

Appellant,

vs.

SAFEWAY FURNITURE CO., INC., *et al.*,

Appellees.

Appeal From the United States District Court for the
Southern District of California, Central Division.

OPENING BRIEF FOR APPELLANT.

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Record in this case.....	R.
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Findings of Fact.....	FF
Request for Admissions.....	RA
Answer to Request for Admissions.....	AA
Complaint	C
Conclusions	Con.
Answer	Ans.
Wilde's Affidavit admitted by	
Answer to Interrogatory	Aff.

(The Roman or Arabic numbers following any of the above abbreviations will indicate the page or paragraph referred to.)

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Appeal From the United States District Court for the
Southern District of California, Central Division.

OPENING BRIEF FOR APPELLANT.

Statement of Jurisdiction.

Jurisdiction of the District Court was predicated upon the diversity of citizenship of the parties and the amount involved being in excess of \$3,000, exclusive of interests and costs.

The action sought to enjoin the use by defendants of plaintiff's trade name "Safeway", the alleged and admitted value of which to plaintiff in California was between 20 and 25 million dollars [R. 11], and its total value through the United States and Canada, 75 million dollars [R. 11].

The court denied plaintiff any relief.

The District Court had jurisdiction of the action by virtue of the Act of June 25, 1948, c. 646, Sec. 1, 62 Stat. 930, 28 U. S. C. (1952 ed.) Sec. 1332. The jurisdiction of this court on appeal to review the judgment of the District Court exists under the Act of June 25, 1948, c. 646, Sec. 1, 62 Stat. 929, 28 U. S. C. (1952 ed.) 1291 and upon the Act of June 25, 1948, c. 646, Sec. 1, 62 Stat. 930, 28 U. S. C. (1952 ed.) 1294.

Statement of the Case.

We shall refer to the parties as they appeared in the court below as “plaintiff” and “defendant”.

The action was instituted on December 1, 1954, against Morris Rudner, his wife Rose Rudner, his son Gerald Rudner, and the Safeway Furniture Co., Inc., a California corporation organized by the individual defendants. The action sought to enjoin the corporation from attempting to further operate under the name of Safeway Furniture Co., Inc., and to enjoin Morris and Gerald Rudner, as copartners, from operating a store in Van Nuys under the name of Safeway Furniture or Safeway Furniture Company [R. 20-21].

At the time of the trial, May 24, 1956, the corporate defendant had ceased to do business, having forfeited its charter, the store formerly operated at Reseda by it being conducted by the purchaser under an entirely different name; the only store being operated by any of the defendants at the time of the trial under the name of “Safeway” being the one at Van Nuys initially operated by Morris Rudner and his son as copartners. However, the son had withdrawn from the partnership and Morris Rudner was the sole proprietor of the Van Nuys store.

Hence, the action was dismissed without prejudice as to all defendants other than Morris Rudner [R. 183-185, 186-187, 88, 53-54]. While the averments of the complaint are as to the actions of the defendants, we shall, only refer to them as allegations of the actions of Morris Rudner.

The complaint alleged the appropriation by the plaintiff's predecessors in interest in 1926 of the word "Safeway" and the continuous use from 1926 by plaintiff and its predecessors of the word "Safeway" as their trade name, either alone or in combination with "Stores" and "Stores Incorporated", the expenditure of vast sums in advertising plaintiff's business under the name of "Safeway" and the building up of a very vast and profitable business under that name [R. 3-22].

The complaint then alleged that Morris Rudner, in co-partnership with his son Gerald, operated a furniture store under the fictitious name of Safeway Furniture Company at 6416 Van Nuys Boulevard in Van Nuys [C. XXIII, R. 13]; that the adoption of the name Safeway Furniture Company was for the purpose of trading upon the good will and reputation established by the plaintiff under said name [C. XXVIII, R. 15-16].

It was then alleged that the defendant improperly used the word "Safeway" in the advertisement of his business in that "Safeway" was the most prominent in defendant's advertisements and was printed and copied in the block lettering used by the plaintiff, and in imitation of and to resemble plaintiff's use of its trade name Safeway [C. XXX, R. 16-17].

The complaint prayed that the defendants be enjoined from using the name "Safeway" in the conduct of the Van Nuys store and any future store conducted by the corporate defendant; in the alternate, that defendants be enjoined from the improper advertising of the name "Safeway" [R. 20-21].

The answer, while admitting the appropriation of the name "Safeway" by plaintiff's predecessors in interest in 1926 and the continuous use by plaintiff and its predecessors in interest and its vast advertisement of "Safeway", denied plaintiff's right to the exclusive use of that word, denied any intent by defendants to trade upon the good will which plaintiff's advertising and business methods had created in the name "Safeway", and alleged the use of the name "Safeway" by a number of other persons in the County of Los Angeles. The answer denied all allegations of improper advertising by defendants or the alleged improper motive for such alleged advertising [R. 22-28].

UNCONTROVERTED FACTS.

The following uncontroverted facts were established at the trial by either: (1) the allegations of the complaint which were either directly admitted by the answer or by its failure to deny them; (2) the answers to the request for admissions; (3) stipulations of the parties; and (4) the uncontradicted testimony introduced at the trial.

In 1925, plaintiff's predecessors in interest commenced the operation of a chain of stores throughout California and a number of states of the Union in which groceries, meats, food products and certain articles of household

equipment were sold [C. VII,* R. 5; Aff.**, R. 137-139; RA No. 7; AA No. 7, R. 29-30, 41; R. 202, Pltf. Ex. 11 in Folder of Trial Exhibits]; that commencing in 1929 the said chain of stores had been extended through the Dominion of Canada [C. VII, R. 5]; that plaintiff has succeeded to all of the rights and interests of its predecessors in interest [C. VII, R. 5; Aff., R. 139; RA No. 8, AA No. 8, R. 30, 41]; that plaintiff has continuously maintained a number of retail stores in San Fernando Valley, there being fourteen stores in said San Fernando Valley in 1927 and twenty-three stores on May 15, 1956 [R. 47]; that as a result of plaintiff's and its predecessors' method of conducting business and advertising, plaintiff's business has grown steadily, and at the time of the filing of the action plaintiff was operating 1,867 retail stores in California, the District of Columbia and 23 other states, and through a wholly owned subsidiary, 141 stores in the Provinces of British Columbia, Alberta, Saskatchewan, Manitoba and Ontario, Canada. Of its stores in the United States, it operated approximately 489 in the State of California, 282 of which were in its Los Angeles Distribution Division, 175 being in Los Angeles County [C. X-XI, R. 6-7]; that in 1926, plaintiff's predecessors adopted the *arbitrary, coined and distinctive trade name*

*Where paragraphs of the complaint are cited as authority for undisputed facts, those paragraphs contain allegations which are either specifically admitted or not denied by the answer.

**Mr. Wilde's affidavit was Exhibit "Q" to plaintiff's Request for Admissions and the truth of its averments was admitted by the answer to Request No. 33 [R. 41]. The entire affidavit was read into evidence and is in the printed Record pp. 136-141. It is also contained in the Exhibits which it was stipulated could be considered by the Court without being printed [R. 269-270]. Citations to the affidavit will be to the printed portions of the record.

“Safeway” for use by them and their affiliated retail stores and in their various advertisements [C. XII, R. 7-8]; that since the adoption of the word “Safeway” plaintiff and its affiliates and predecessors in interest have continuously used the word “Safeway” both alone and in combination with the words “Stores Incorporated” and “Stores”, the name “Safeway” being placed conspicuously on each of its offices, warehouses and stores in Southern California [C. XIV, R. 8-9; C. XVII, R. 10; RA No. 7, AA No. 7, R. 29-30, 41; RA No. 11, AA No. 11, R. 31, 42; R. 44-47]; *that at least since December 31, 1942, all stores operated in California by plaintiff were operated solely under the name of “Safeway”, all Stores’ signs and advertising being conducted under that name* [Aff., R. 141; R. 47]; that Safeway has acquired a secondary meaning throughout the United States and especially in Southern California indicating the plaintiff and the retail business conducted by it [FF IV, V, VI, R. 76-77, 91, 97, 98-99, 103-104, 167-168; C. XIV, R. 8-9; C. XVI, R. 10; C. XIX, XX, R. 11-12; RA No. 7, AA No. 7, R. 29-30, 41; RA No. 11, AA No. 11, R. 31, 42].

Indeed, the court announced that it would take judicial notice of its secondary meaning [R. 134, 168, 188]. In fact, defendant in his deposition which was admitted in evidence [R. 197], testified that before the suit he had not known that the name of the plaintiff was Safeway Stores, Incorporated, never having heard it referred to other than as Safeway [R. 227-228].

That the advertising expense of the plaintiff and its predecessors in interest in connection with the word “Safeway” in Southern California from July 1, 1926, through

1941, was \$3,993,552.21; that in advertising the name "Safeway" between the years 1942 and 1953 the plaintiff has expended throughout the United States and Canada \$92,942,471, of which \$22,410,000 has been expended in California and \$11,916,000 of which was expended in Southern California [C. XIV, R. 8-9; R. 44-45]; that as a result of plaintiff's vast advertising expenditures and its methods of doing business, and its efforts to give the best service at the lowest prices, plaintiff and its affiliates have built up a reputation for the name "Safeway" which is of the value of 75 million dollars, of which 20 to 25 million is allocable to California [C. XV, XVI, R. 10; C. XIX, R. 11; FF VI, R. 77].

Plaintiff's sales have been steadily increasing. During the calendar year ending December 31, 1953, its total sales throughout the United States and Canada amounted to \$1,578,400,000, of which \$431,309,000 were in California [C. XVIII, R. 10-11; RA No. 32, AA No. 32; R. 36-37, 41]; such use of the trade name "Safeway" by plaintiff has been so extensive that for many years Safeway has been known to the public in California and Southern California as "the commercial signature of a reliable retailer who sells products of a high quality at reasonable prices" [C. XX, R. 11-12].

Plaintiff introduced in evidence a large number of advertisements by both itself and defendant. Additionally, in response to Requests for Admissions Nos. 14-28, defendant admitted that numerous other advertisements contained as Exhibits to said Requests were those of his Van Nuys store [R. 32-35, 41]. In his deposition which was admitted in evidence [R. 197], plaintiff testified these

were inserted either by himself or under his authorization [R. 257-258]. Because of the impossibility of reproducing the exact appearance of these various advertisements and the desire of the parties that the court examine the originals, by stipulation printing of them was dispensed with [R. 269-270]. By separate stipulation it was provided that the appellant could deliver to the clerk of the court three sets of folders containing photostats of the various advertisements. We have accordingly handed to the Clerk two sets of three folders, one labeled "Folder of Trial Exhibits" and the other "Folder of Exhibits to Requests for Admissions". Copies of the contents of said folders have, of course, been delivered to counsel for appellee.

As the advertising of defendant of the word "Safeway" is discussed under the second subdivision of Point I, it is sufficient to state that any inspection of the advertisements will show that in one the defendant used *only* the word "Safeway" and in most if not all of the others, Safeway was the most conspicuous word, and "furniture" and "furniture company" when Company was used, being printed in much smaller letters. Further, the script and block letters of the word "Safeway" were the same as used in the plaintiff's advertisements.

The evidence at the trial showed that while the plaintiff in its Los Angeles Division had sold only a very limited number of items that are usually purchasable at furniture stores, in many of its Divisions plaintiff had for a number of years been selling a large and varied line of household furniture such as hassocks, T.V. tables, chairs and outdoor furniture such as lawn chairs, patio tables, etc.,

and “a whole host of products that would fall under furniture classification” [R. 107-108, 111-112, 158-159; Exs. 4, 5-A, 5-F in Folder of Trial Exhibits], as well as cooking utensils, houseware and dishes [R. 113-114]; that plaintiff had recently placed a new manager in charge of its Los Angeles Division, Mr. W. A. Christensen (formerly Manager of its Oklahoma Division); and that he intended to sell in the stores in the Los Angeles Division all of the articles of furniture above enumerated and was at the time of the trial in the process of including such items in plaintiff’s sales and advertisements [R. 154, 155-157, 159, 164-165].

Defendant acquired an interest in the Van Nuys store in April, 1952 [R. 184, 218, 220]. The store had been operated under the name Safeway Furniture Company for about two years by Kiefer and Simms [R. 184-185, 219]. A special partnership was formed in which Kiefer and Simms were the special partners and defendant the general partner, the same continuing for about a year when defendant acquired the interest of the special partners [R. 185, 220]. As stated, defendant’s son, Gerald Rudner, was a partner with him for a short time, but had ceased to be a partner at the time of the trial, defendant Morris Rudner then being the sole owner. The defendant’s store has been operated variously as “SAFEWAY,” “SAFEWAY furniture” and “SAFEWAY furniture company.” [R. 184, 191-192, 257-258; Exs. 1, 2, 3 and 6 in Folder of Trial Exhibits; Exs. A through O, in Folder of Exhibits to Requests for Admissions.] As indicated, in defendant’s advertisements, the word “SAFEWAY” was in large type and the words “furniture” and “furniture company”, when company was used, were in smaller type

so that a person glancing at the advertisements and not reading them carefully would notice only the word "SAFEWAY."

Defendant admitted that he knew at the time he acquired an interest in the Van Nuys store of the chain of stores which plaintiff operated under the name of Safeway [R. 187-188, 227-228]. As before noted, he testified in his deposition which was admitted in evidence [R. 197] that during the six years he had lived in Los Angeles prior to buying into the store at Van Nuys he knew of Safeway Stores, but did not know that plaintiff had any other name than Safeway until the suit [R. 227-228]. We quote the last question and answer on that subject:

"Q. You never heard anything except 'Safeway'?"

"A. That's all I ever heard." [R. 228.]

Although the court, for some unexplainable reason, refused to permit the defendant to be examined as to whether he knew that any good will had attached to that name [R. 188], the court found, as hereafter stated, that "Safeway" was not used by defendant with any intention of trading upon the good will that attached to "Safeway." [FF XI, R. 78-79.]

The only witness in defendant's behalf was himself. Defendant made no attempt to contradict the secondary meaning that the word Safeway had acquired, but contented himself merely with giving a description and the character of the furniture he sold, denying that he sold most, if any, of the articles of furniture, which plaintiff sold in any of its stores [R. 204-205], that he did not use the name Safeway Furniture or Safeway Furniture

Company for the “*sole*” purpose of trading upon its good name [R. 206]; that he had never had any customer ask if defendant was affiliated with the plaintiff or if plaintiff was sponsoring defendant’s store. [R. 206.]

Defendant also introduced in evidence one very small classified advertisement appearing in the Examiner May 20, 1956, entitled “Safeway Open Front Warehouse Sale! 8510 So. Broadway” [R. 207; Ex. “A” of the Folder of Trial Exhibits].

Defendant received in due course of mail a letter written by plaintiff’s attorneys under date of October 20, 1953, demanding that he cease and desist from using the word Safeway [R. 193-194; Ex. 7 in Folder of Trial Exhibits].

We believe the foregoing is a condensed, but entirely comprehensive and accurate statement of the undisputed and uncontroverted facts disclosed by the Record upon which plaintiff submitted to the court its claim for relief. We do not believe defendant will question it.

At the conclusion of the evidence the court stated: “I think there is only one issue in this case that I am interested in, and that issue can be summed up in the words of the court in the case of Phillips v. The Governor as to whether or not the two stores had to be in competition.” [R. 211-212.] See prior comments of court to same effect during the trial [R. 146-151, 157].

The court, on the 18th of June, 1956, filed its written Opinion in which it is specifically found that the plaintiff and its predecessors in interest have continuously used the name “Safeway” since 1925 and its secondary meaning as alleged in the complaint [R. 54-55], but found

that there was no competition between the parties, and on that ground denied plaintiff any relief whatever, the court thus stating the reasons for such denial (emphasis ours):

“In the case at bar the Court is of the opinion there is no competition between the parties hereto of like merchandise; there has been no confusion between the parties’ products, and there is *little* likelihood of confusion *so long as plaintiff continues to operate retail food and grocery markets and defendant continues to operate a retail furniture store*. We cannot agree with plaintiff that it is entitled to protection of the word ‘Safeway’ in the entire retail business in Southern California. Its protection must be limited to the retail trade *definitely connected and associated with sale of commodities usually found in a retail grocery and food store.*” [R. 60.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The Findings of Fact and Conclusions of Law, entered following the opinion, of course, were generally in conformity with the views of the court expressed during the trial and in its written Opinion.

In Findings I, II and III the court found diversity of citizenship and that it had jurisdiction of the action [R. 75-76]. In Finding IV [R. 76], the court found that the plaintiff and its predecessors in interest since 1925 had operated a large chain of stores throughout California and other states of the Union and Canada in which it sold retail food and groceries, meats, vegetables, incidental notions, kitchenware, furniture polish, floor wax and expendable items that are used in maintaining a house; that in cer-

tain of its stores in Districts other than Los Angeles, plaintiff has sold various items of household furniture such as T.V. tables, hassocks, lawn chairs, dishes, glassware and other articles of tableware. Finding V reads as follows (emphasis ours):

“That in 1926 plaintiff adopted as a trade name the word ‘Safeway’ for use by itself and its affiliated companies. For a short period plaintiff advertised under both the name of ‘Safeway’ and ‘Safeway Stores’. That at the time of filing this action and ever since and for at *least ten years* prior to the opening of defendant’s store by defendant’s predecessors in interest, *plaintiff has advertised extensively under the name ‘Safeway’ and the word ‘Safeway’ has obtained a secondary meaning throughout the State of California, and especially in Southern California, as indicating the chain of stores operated by the plaintiff.*” [R. 76-77.]

The court found that there was no competition between the parties [FF XIV, R. 79], and found against all the allegations of the plaintiff as to alleged improper advertising of the word Safeway by defendant [FF IX, X and XI, R. 77-79]. On the foregoing Findings of Fact, the court concluded that it had jurisdiction of the action [Con. I, R. 80] but that because there was no competition between the parties, and no showing of confusion the plaintiff was not entitled to any relief of any character [Con. VII, VIII and IX, R. 81].

QUESTIONS FOR DECISION BY THIS COURT.

The decision of the court below presents five questions of transcendent importance, not only to the plaintiff but to the entire commercial world:

1. Is there any evidentiary support of the findings that there was no competition between the parties?

2. Where a retailer has included in its corporate or fictitious name a unique or coined word and has used that single word in the advertisement of the retailer's merchandise and has spent millions in such advertising, and that single word has obtained a *state* and *nation-wide* secondary meaning as indicating to everyone the retailer and his business and the goods he sells, can a *second* retailer, many years after the secondary meaning has attached to the word, include that word in the corporate or fictitious name under which the second retailer attempts to sell a different line of merchandise?

3. In the situation outlined in the foregoing question, has the second retailer the right not only to employ the word "Safeway" in his trade name but to advertise the sale of a different line of merchandise under the name of "Safeway" by doing as the evidence shows the defendant has done, either using in its advertisement the word "Safeway" alone, or advertising as either "Safeway Furniture" or "Safeway Furniture Company", and in such advertisements making the word "Safeway" the dominant portion by printing it in very large letters in exact imitation of the plaintiff's advertisements, and the word "Furniture" or "Furniture Company" in smaller letters, so that "Safeway" is the one word the average person casually glancing at the advertisement will see?

For brevity, we have and shall refer to such advertising as “improper advertising.”

4. In the situation outlined in the first question, is it necessary, in order to enable the first merchant to prevent the second merchant from using his trade name, to introduce any evidence of actual confusion to the public?

5. In the situation outlined in the first question, can the second retailer justify his wrongful use of the first retailer's trade name and the improper advertising of it by showing that others may also have improperly used the name, especially when there is no evidence or suggestion that such other users have improperly advertised the said trade name?

Reason, logic, and the decisions of this and the California courts require an emphatic answer in the negative to each of the foregoing questions.

There is no specific finding or conclusion of the court that presents the fifth question, but aside from the defendant's claim of no competition, the use of the word “Safeway” by others was the only defense relied on by defendant, and we are certain he will urge it in defense of the judgment appealed from. In addition to this, the court commented throughout the trial on the use by others of plaintiff's trade name [R. 129-136, 142-145]. In his written memorandum the court commented on it in such a manner as to indicate that such use might be the basis for the limited protection to which he concluded the plaintiff was entitled. For this reason, we feel we are justified if not required to cite the numerous decisions of this and other courts, that it is no defense to an action to enjoin the use of a merchant's trade name to show that others have used the name.

We shall discuss each of the five questions above outlined separately under four main headings or points, inverting questions three and four and combining one and two in our first point under appropriate subheads. We shall include in our presentation of the points above outlined the errors of the court in its Findings of Fact and Conclusions of Law and rulings on the admissibility of testimony set out in our Specifications of Errors.

Unless otherwise noted, all emphasis throughout the Argument will be ours.

SPECIFICATIONS OF ERRORS RELIED ON.*

1. The judgment is contrary to law and is not supported by the Findings of Fact. Under the uncontroverted facts disclosed by the record, and also on the specific facts found by the court, plaintiff is entitled to an injunction as prayed for, enjoining the defendant from using the word "Safeway" in its fictitious name, and also from improperly advertising his merchandise under plaintiff's trade name "Safeway".

2. The court erred in Finding No. IX to the effect that defendant did not adopt the name "Safeway" for the purpose of fraudulently and illegally competing with the plaintiff, said finding not being supported by, but contrary to the evidence and law. The court further erred in finding that defendant did not adopt the name because of purchasing an interest in an existing company known

*The following technical Specifications of Errors are set out to comply with Rule 18 of this Court, but they will not be separately discussed, the errors of the court in its Findings and Conclusions and rulings on the admissibility of testimony being discussed, as above indicated, in the presentation of the four main points above outlined.

as the “Safeway Furniture Company”, and erred in finding defendant continued said name simply because it would be costly and expensive to change the name. If a finding of fact, it is unsupported by and contrary to the evidence that defendant did not buy into a company but purchased an interest in a partnership using a fictitious name, and his retention of that name constituted an adoption of it, and the expense for changing a name is not a justification in law for the defendant’s continuing unlawfully to use the plaintiff’s trade name. Further, the evidence shows defendant continued the use of plaintiff’s trade name for the purpose of trading on the good will of plaintiff’s trade name.

3. The court erred in making Finding X to the effect that defendant’s advertising was not carried on in a way to convey the idea that the defendant’s sales were made with and sponsored by plaintiff, said finding not being supported by but is contrary to the evidence.

4. The court erred in making Finding XI to the effect that defendant’s advertisements were not printed so as to cause the word “Safeway” to be the most prominent part of such advertisement, or for the purpose of trading upon the name, reputation and standing of plaintiff, said finding not being supported by but is contrary to the evidence.

5. The court erred in making Finding XII to the effect that defendant’s use of the name “Safeway” would not lead the public to believe the standard of plaintiff’s business or services had fallen or would fall, said finding not being supported by but is contrary to the evidence.

6. The court erred in making Finding XIII to the effect that the use of the name “Safeway Furniture Com-

pany” would not cause confusion in the minds of the public between plaintiff’s merchandise and defendant’s, or that anyone had not been misled by the similarity of names, said finding not being supported by but contrary to the evidence. The court further erred in finding that there would be little likelihood of confusion “so long as plaintiff continues to operate retail food and grocery markets and defendant continues to operate a retail furniture store.” If a finding of fact, it was not supported by the evidence but contrary thereto, and ignored the undisputed evidence that plaintiff had been selling large amounts of household furniture long prior to the adoption by defendant’s predecessors in interest of the name “Safeway Furniture Company.” Said finding further places an unreasonable limitation and restriction upon the plaintiff’s right to expand its business.

7. The court erred in making Finding XIV to the effect that there was no competition between the plaintiff and defendant, said finding not being supported by but is contrary to the evidence.

8. The court erred in failing to find upon the issue presented by the pleadings that the use of “Safeway” by defendant would dilute plaintiff’s good will value in said name.

9. The court erred in making Conclusion III to the effect that there was no confusion between the plaintiff’s store and the defendant’s store. If the same be a conclusion it is not supported by the specific facts found, and if it is a finding of fact it is not supported by but is contrary to the evidence.

10. The court erred in making Conclusion IV to the effect that there was no competition between the plaintiff’s store and the defendant’s store. If the same be a conclusion it is not supported by the specific facts found, and if it is a finding of fact it is not supported by but is contrary to the evidence.

11. The court erred in making Conclusion V to the effect that no one has been misled by defendant's use of the name "Safeway Furniture Company". If the same be a conclusion it is not supported by the specific facts found, and if it is a finding of fact it is not supported by but is contrary to the evidence.

12. The court erred in making Conclusion VI to the effect that plaintiff has not been damaged by the use by the defendant of the name "Safeway Furniture Company". If the same be a conclusion it is not supported by the specific facts found, and if it is a finding of fact it is not supported by but is contrary to the evidence.

13. The court erred in making Conclusions VII and VIII to the effect that the plaintiff is not entitled to an injunction or to any relief. Said conclusion is erroneous, contrary to law, and is not supported by the specific facts found in Findings I, IV, V, VI and VII.

14. The court erred in making Conclusion IX to the effect that plaintiff is entitled to protection of the name "Safeway" only as it pertained to the retail trade connected and associated with the sale of commodities usually found in retail grocery stores and food markets. The conclusion is erroneous, and is not supported by but is contrary to the law, and is not supported by the specific facts found in Findings IV, V, VI and VII.

15. The court erred in making Conclusion X. If the said conclusion makes the opinion of the court a part of the Court's Formal Findings of Fact and Conclusions of Law the said opinion erred in the facts which it purported to find and failed to find for the same reasons set out in the preceding Specifications, 1 to 8 inclusive. The opinion erred in the legal conclusions set out in said opinion for the same reasons set out in Specifications 9 to 14 inclusive.

16. The court was also in error in said Opinion in finding or concluding that the defendant has the right to employ the word "Safeway" in his fictitious name under which he did business because he did not adopt that word but bought an interest in a store already being operated under the name "Safeway"; said finding or conclusion being contrary to law.

17. The court erred in sustaining the defendant's objection to the following question put to the witness Bauer:

"Q. Now, Mr. Bauer, I would ask you whether or not in your opinion, from your studying of the advertisements and advertising, those three advertisements of the defendant in this case would or would not cause damage to the plaintiff?" [R. 95]

and erred in sustaining the defendant's objection to the following offer of proof by the plaintiff:

"Mr. Sterry: If your Honor please, let me state what I expect to prove by him, and then if your Honor rules that I can't prove it, why, I shall have to bow to your Honor's ruling.

"I want to show by him that he is qualified, first, as an expert, he has been studying advertising, has been studying those things, that even assuming that a person was not confused by the advertising, that it would nevertheless have a tendency to cause confusion to the buying public in that if anybody patronized this store, and it was generally known as Safeway Furniture, and they stated, for instance, that they were dissatisfied with any deal, if they stated they got gypped or were dissatisfied with the deal at Safeway, that that would redound, would be detrimental to the plaintiff. Now that, I believe, is the subject of expert testimony." [R. 96.]

18. The court erred in rejecting the plaintiff's offer of proof by the witness S. M. White:

"Mr. Sterry: Mr. Whelan calls my attention, if your Honor please, to this, and I want to make the same offer of proof with reference to the confusion of the advertisements of the Safeway that have been introduced in evidence that I made to Mr. —

"The Court: The advertisements speak for themselves. They are before the court.

"Mr. Sterry: Your Honor, I submit to your ruling. I am not trying to get your Honor to reverse it. I am simply saying I want to make the same offer now, and I assume your Honor will sustain an objection.

"The Court: Same ruling, Mr. Sterry." [R. 169-170.]

19. The court erred in sustaining the objection of the defendant to the following question put to the witness Frank Denney:

"Q. What has been the tendency, if any, of your competitors to sell merchandise of that character?" [R. 116.]

20. The court erred in sustaining the defendant's objection to a question put to him while being examined by the plaintiff as an adverse witness:

"Q. You knew, didn't you, that they had built up a very high and valuable good will under that name?" [R. 188.]

21. The court erred in overruling plaintiff's objection to the introduction by defendant of so much of defendant's Exhibit "A," a stipulation dated May 16, 1956, and filed in the court below on May 21, 1956, as related to filings of fictitious and corporate names in the office of the County Clerk of Los Angeles County.

ARGUMENT.

I.

The Court Erred in Its Findings That the Parties Are Not in Competition and Erred in Its Conclusions That It Was Necessary to Show That There Was Competition Between Them in Order to Enable the Plaintiff to Enjoin the Defendant (1) From Using Plaintiff's Trade Name, and (2) From Advertising Defendant's Merchandise Under Plaintiff's Trade Name. The Court Also Erred in Declining to Allow the Plaintiff to Show That Items of Household Furniture Were Usually Sold in Food Markets.

The heading presents three closely related questions of the utmost importance to the entire retail world. We will present them separately under appropriate subheads.

- (1) THE COURT WAS IN ERROR IN FINDING THAT THE PARTIES WERE NOT IN COMPETITION. THE FINDING WAS DIRECTLY CONTRARY TO THE UNDISPUTED EVIDENCE AND PROBATIVE FACTS FOUND BY THE COURT.

It is apparent from the record that the court's decision that the parties were not in competition arose from the court's misconception that to be in competition they had to sell exactly the same line of merchandise or conduct exactly the same character of store.

The testimony showed without any controversy that the plaintiff was operating a large chain of stores in which the majority of the merchandise it sold was groceries, meats and vegetables, but it was also selling a line of household furniture, Mr. Denney, Manager of plaintiff's non-food Purchasing Division testifying:

"The Court: Does the Safeway Stores handle furniture?"

“The Witness: Yes, Safeway Stores does.

“The Court: What kind of furniture?

“The Witness: We handle such things as lawn chairs, hassocks, TV tables—*just a whole host of products that would fall under the furniture classification.*” [R. 107.]

The evidence also showed without controversy that while only a very limited line of articles of household appliances had been sold in the Los Angeles Division, the plaintiff was intending to sell in the Los Angeles Division all of the extensive lines of household furniture and household equipment carried in its other divisions [R. 112-113, 154, 155-157, 159, 164-165].

This evidence was uncontradicted. Indeed the court found:

“In certain of its stores in Districts other than Los Angeles, plaintiff has sold various items of household furniture such as T.V. tables, hassocks, lawn chairs, dishes, glassware and other articles of tableware.” [FF. IV, R. 76.]

It is thus apparent that stores of the parties were in competition.

It is true that the defendant testified that he was not selling any of the lines of furniture that the plaintiff sold, but we do not apprehend that merchandise of two retailers must be identical for it to be held that they are in competition, so as to prevent one from using the trade name of the other. Moreover, it is obvious that the defendant at any time he desires can add to his line of merchandise. It is certain that if the plaintiff through its advertising and method of sales builds up good will for the furniture and household equipment it sells, plaintiff can easily add such merchandise to his stock.

The court's remarks during the trial clearly indicate that it gave no heed to the above consideration, but based its findings of lack of competition upon the court's belief that for the parties to be in competition it would be actually necessary for the plaintiff to operate a furniture store or the defendant to undertake the sale of food.

We quote the questions and remarks of the court during the examination of Mr. Christensen.

"The Court: May I ask this witness a question?

"Mr. Sterry: Certainly, your Honor.

"The Court: Does Safeway Stores intend to go into the furniture business here in Los Angeles? When I say furniture business, I mean the common, ordinary understanding of the word furniture.

"The Witness: I think I understand what you mean. In other words, go into the general line, start selling a general line of furniture? We do not intend to do that.

"The Court: You intend to sell special articles?

"The Witness: That's right. We will sell first one thing and then another in the furniture line. We have been doing that in the past where I came from."
[R. 156.]

On Cross-Examination

* * * * *

"The Court: This witness has testified they don't intend to go into the general furniture business.

* * * * *

"The Court: I suppose it can be stipulated that the defendant does not sell food products or meat or vegetables, Mr. Sterry?

"Mr. Sterry: There is no issue on that point.

"The Court: The only thing he sells is furniture.

"Mr. Sterry: Yes." [R. 161-162.]

We submit that the court's conception of what constituted competition was erroneous and is directly contrary to the decision of this court in *Safeway Stores, Incorporated v. Dunnell* (9th Cir. 1949), 172 F. 2d 649, hereinafter often referred to as the *Dunnell* case. In that case the action was instituted by Dunnell against the defendant for a declaration that Dunnell was entitled to register the trade mark "Safe Way" for toilet seat covers which he was manufacturing and selling to a sanitary service which furnished them free to public lavatories. The defendant therein (plaintiff herein), in addition to denying that the plaintiff was entitled to the declaration prayed for, filed a counterclaim seeking to restrain the plaintiff from using the words "Safe Way" in the course of his business or in selling toilet seat covers. The District Court granted the relief prayed for by plaintiff and denied the prayer of the counterclaim upon the ground that the parties were not in competition. This court reversed upon the ground as we shall show under the next subdivision that "Safeway" was the trade name of the defendant and appellant (plaintiff and appellant herein) that competition was not necessary in order for it to prevent others from using its trade name.

This court held however, that the mere fact that defendant at the moment was not selling seat covers did not show that the parties were not in competition, pointing out that the defendant had sold toilet tissues which could be used for seat covers and that to regard the parties as not in competition would unduly limit the right of appellant to expand its merchandise to include seat covers.

We submit that in view of the uncontradicted evidence in this case and the specific findings of the court that its conclusions that there was no competition between the parties cannot be reconciled either with logic or with the decision of this Court in the *Dunnell* case.

- (2) THE COURT ERRED IN REFUSING TO ALLOW THE PLAINTIFF TO SHOW THAT AT THE PRESENT TIME ITEMS OF HOUSEHOLD FURNITURE SUCH AS IT WAS SELLING IN OTHER OF ITS DIVISIONS AND WHICH IT PLANS TO SELL IN THE LOS ANGELES DIVISION ARE FOUND IN MOST FOOD MARKETS.

Mr. Denney, while being examined as to the character of such of non-food items sold by plaintiff, on the objection of defendant was prevented from testifying that furniture was sold by competitors.

“Q. What has been the tendency, if any, of your competitors to sell merchandise of that character?

“Mr. Magid: I object to that, if the court please, not being within the issues of this case, irrelevant, immaterial.

“The Court: Mr. Sterry, I know the tendency of most of the supermarkets *is to go in all lines of business. In fact, there are even some who are selling clothing.*

“Mr. Sterry: Yes.

“The Court: But I don’t think it has a thing to do with this case. *The question here is whether or not the plaintiff has a right to preclude the defendant from using the word Safeway.*” [R. 116.]

It is a little difficult to understand the basis of the ruling of the court in view of its conclusion that the protection of plaintiff’s name was limited “to the retail trade definitely connected and associated with sale of commodities *usually* found in a retail grocery and food store.”

If that conclusion is correct, *upon what possible theory can it be said that it was entirely immaterial whether the average supermarket, which of course is a food store,*

sold household furniture? It surely cannot be the law that a merchant who has established a good will value of \$75,000,000 for his trade name cannot prevent another merchant from selling merchandise of the same classification merely because the great bulk of the goods of the two merchants are not of the same general character.

We shall await with great curiosity defendant's reply.

- (3) THE COURT ERRED IN HOLDING THAT NOTWITHSTANDING "SAFEWAY" HAD ACQUIRED A SECONDARY MEANING INDICATING THE PLAINTIFF AND ITS MERCHANDISE AND HAD BECOME THE TRADE NAME OF THE PLAINTIFF, THE COURT COULD NOT ENJOIN THE DEFENDANT FROM USING PLAINTIFF'S TRADE NAME BECAUSE OF LACK OF COMPETITION IN THE MERCHANDISE SOLD BY THE PARTIES.

The court, because of its erroneous conception that the parties were not in competition, concluded:

"Plaintiff is entitled to the protection of the word 'Safeway' only insofar as it pertains to the retail trade *definitely connected and associated with sale of commodities usually found in a retail grocery and food store.*" [Con. IX, R. 81.]

We believe that the slightest consideration will show that even if the above conclusion were held to be correct,—and we do not believe it can be,—the decree entered by the court below must be reversed.

If, as the court concluded, the protection afforded to plaintiff's trade name is limited to commodities usually found in retail grocery and food stores, the court was in error in declining to allow the plaintiff to show that today, items of household furniture are usually sold in such stores.

Such error, of course, would be prejudicial unless it be conceded,—as we think it must be,—that the court's observation that it would take judicial notice of the fact that under present day conditions super food markets "go into all lines of business, in fact, there are even some who are selling clothing." If this observation was correct,—and there can be no question of it,—obviously the mere fact that the majority of plaintiff's merchandise was meats and groceries could not prevent it from receiving full protection for its trade name as to all other items of merchandise it sold or that were usually sold in food markets.

It certainly cannot be the law that where a retailer has adopted a unique or coined word which has acquired a secondary meaning as indicating the retailer and his goods and has developed a good will value in that secondary meaning of his trade name of many millions of dollars, that another retailer, after the development of the value of that name, can use the trade name *merely because he sells only a portion of the same general class of merchandise as does the original appropriator*.

However, in discussing the error of the above quoted conclusion of the court, we shall assume, contrary to the evidence and the facts we offered to prove, and contrary to the facts found by the court and those of which the court stated he would take judicial notice, that the parties were not in competition.

It may be observed that if the conclusion of the court below is correct, a trade name will have very little, if any, value, *especially if, as in the case at bar, the later user of the first retailer's trade name can sell the same general items of merchandise, providing that the bulk of the sales of the two merchants are of a different character*.

Of what advantage would it be to a merchant to select a fanciful, distinctive or coined word as his trade name,

and by his methods of conducting his business and vast advertising create a secondary meaning for it as indicating himself and the goods he sells, if any and every other merchant not selling *precisely* the same merchandise can sell his goods under the trade name of the first merchant? Obviously, as soon as a valuable good will is built up for a trade name, any number of other retailers, the major portion of whose merchandise is not precisely similar to the merchandise of the appropriator of the trade name, will adopt it in an attempt to gain advantage from its good will.

It is equally obvious that the original appropriator of a fanciful, unique or coined name would have no control over the way other retailers selling goods under his trade name conducted their business, and obviously many of them could greatly tarnish it.

The observations of the Court of Custom and Patent Appeals in *Radio Corporation of America v. Rayon Corporation of America* (C. C. P. A. 1943), 139 F. 2d 833, 837, where the court held that the respondent was not entitled to register "RCA Fabric" although the appellant made no fabrics, are most pertinent:

"So in the case at bar if appellee were permitted to use and register the notation 'RCA' which has come to represent to the public the appellant Radio Corporation of America, *other companies likewise might use it upon different products with resultant loss of identity of the Radio Corporation of America.*"

In the instant case, not only does the record show and the court found that "Safeway" had a secondary meaning indicating only the plaintiff, but the decisions show that such secondary meaning had existed for many years and was state and nation-wide. Indeed, as long ago as 1949, this Court held in the *Dunnell* case, *supra*, 172 F. 2d

649, 654, the word "Safeway" was a coined word and was plaintiff's trade name, saying:

" 'Safeway' is a coined word not appearing in the dictionary."

If the defendant can sell and advertise furniture under plaintiff's trade name, so can the bootmaker, clothing store, jeweler or any other merchant selling various lines of goods not usually found in grocery or food stores. Due to the enormous good will value attaching to the word "Safeway," because of plaintiff's vast advertising and business methods, it is certain that if one retailer is judicially allowed to use it, innumerable others, large and small, who are just starting or who do not have an effective trade name, will employ "Safeway."

Waiving the point that in this day, when most stores sell all classes of merchandise, it is difficult to know just what articles are to be found in grocery and food stores, it is evident that the use of plaintiff's trade name by a large number of other retailers will greatly dilute the value of it, especially if they advertise their merchandise, as has the defendant, under the name of "Safeway," either using it alone or making it the most prominent part of their advertisement.

Further, plaintiff will have no control over the way and method that such merchandisers conduct their business, and it is certain that some of them will very greatly tarnish the name of "Safeway" by the method and manner in which they conduct business and treat their customers.

However, the decisions of this Court as well as of other State and Federal Courts, and especially of California are so numerous, uniform and unbroken, that competition is unnecessary, that further argument as to the court's misconception of the protection afforded a trade name is unnecessary.

Logically, we should undoubtedly first present the statutes and decisions of California, since it is settled beyond question that in a case such as this where jurisdiction of the Federal Court exists only because of diversity of citizenship the extent of the protection afforded a trade mark or trade name is governed by the law of the state where it is claimed the name was improperly used. *Pecheur Lozenge Co. v. National Candy Co.* (1942), 315 U. S. 666, 667; 86 L. Ed. 1103, 1105; *United Drug Co. v. Rectanus Co.* (1918), 248 U. S. 90, 98; 63 L. Ed. 141, 146; *Sunbeam Furniture Corporation v. Sunbeam Corporation* (9th Cir. 1951), 191 F. 2d 141, 145; *American Photographic Pub. Co. v. Ziff-Davis Pub. Co.* (7th Cir. 1943), 135 F. 2d 569, 572; *Socony-Vacuum Oil Company v. Rosen* (6th Cir. 1940), 108 F. 2d 632, 635.

Indeed, the statutes of California clearly make competition unnecessary and have been so interpreted not only by the California decisions but by this Court in *Stork Restaurant, Inc. v. Sahati* (9th Cir. 1948), 166 F. 2d 348, 354, and also by the court below in *Hotels Statler Co. v. Chase* (S. D. Cal. 1952), 104 F. Supp. 533, 537.

While the California statutes and the decisions were called to the attention of the court below, it did not pay the slightest attention to them nor to the fact that the defendant did not attempt to distinguish any of the decisions in this State or to argue that under the law of California competition was necessary. The court, based its decision wholly upon its belief that this Court in *Fairway Foods v. Fairway Markets* (9th Cir. 1955), 227 F. 2d 193, sometimes referred to as the "Fairway case," and *Robert C. Wian Enterprises, Inc. v. Persinger* (9th Cir. 1955), 229 F. 2d 154, sometimes referred to as the "Big Boy case," had departed from its prior unbroken line of decisions that competition was not necessary [R.59-60, 146-151, 157].

For that reason, we will first present the decisions of this court on that subject, and shall show that the two decisions relied on by the court below not only do not intimate any intention of this court to depart from its prior decisions, but, on the contrary, the *Big Boy* case impliedly, and the *Fairway* case directly reaffirmed the rule of those decisions.

Decisions of This Court That Competition Is Unnecessary.

The leading and most cited case on the subject is *Yale Electric Corporation v. Robertson* (2 Cir. 1928), 26 F. 2d 972, hereinafter sometimes referred to as the "Yale case." We cite it before citing the decisions of this court because all of them are based upon its philosophy and most of them cite and quote from it.

In the *Yale* case in answer to the appellant's contention that the goods manufactured and sold by the two parties were not in competition with each other, the Second Circuit, speaking through Learned Hand, said:

"However, it has of recent years been recognized that a merchant may have a sufficient economic interest in the use of his mark outside the field of his own exploitation to justify interposition by a court. *His mark is his authentic seal; by it he vouches for the goods which bear it; it carries his name for good or ill. If another uses it, he borrows the owner's reputation, whose quality no longer lies within his own control.* This is an injury, even though the borrower does not tarnish it, or divert any sales by its use; for a reputation, like a face, is the symbol of its possessor and creator, *and another can use it only as a mask.* And so it has come to be recognized that, unless the borrower's use is so foreign to the owner's as to insure against any identification of the two, it is unlawful. * * * Here we are dealing

with a proper name, which, though it has been used quite generally, is shown to denote the defendant when applied to flash-lights. *The disparity in quality between such wares and anything the plaintiff makes no longer counts, if that be true. The defendant need not permit another to attach to its good will the consequences of trade methods not its own.*"

Yale Electric Corporation v. Robertson, 26 F. 2d 972, 974.

The decision has consistently been cited with approval and followed by this Court, in *Stork Restaurant, Inc. v. Sahati* (hereinafter referred to as the "Stork case") (9th Cir. 1948), 166 F. 2d 348, 354; *Del Monte Special Food Company v. California Packing Corp.* (9th Cir. 1929), 34 F. 2d 774, 775; *Horlick's Malted Milk Corp. v. Horlick's, Inc.* (9th Cir. 1932), 59 F. 2d 13, 15; *Safe-way Stores, Inc. v. Dunnell* (9th Cir. 1949), 172 F. 2d 649, 656; *Fairway Foods, Inc. v. Fairway Markets* (9th Cir. 1955), 227 F. 2d 193, 196. See also to the same effect *Phillips v. The Governor & Co.* (9th Cir. 1935), 79 F. 2d 971, 974; *North American Aircoach Systems, Inc. v. North American Aviation, Inc.* (9th Cir. 1955), 231 F. 2d 205; cert. den. 351 U. S. 920; 100 L. Ed. 599.

In the *Dunnell* case (9th Cir. 1949), 172 F. 2d 649, 655, 656, this Court said in part:

" . . . The situation is that described in *American Steel Foundries v. Robertson*, 269 U. S. 372, 383, 46 S. Ct. 160, 163, 70 L. Ed. 317, 'where a single word in the corporate name has become so identified with the particular corporation that, whenever used, it designates to the mind of the public that particular corporation.'

“ . . . Even though ‘Safeway’ was not appellant’s ‘name’ within the literal language of the old statute, *as we hold it is*, it is plainly appellant’s ‘trade name’ within the express language of the Lanham Act.

* * * * *

“Even assuming the absence of any competition of toilet tissues and Dunnell’s covers for protection of toilet users, *Stores is entitled to its injunction*. The principle is well stated in Judge Learned Hand’s opinion in *Yale Electric Corporation v. Robertson*”

See also as holding competition is not necessary to prevent the use by others of the name “Safeway”: *Safeway Stores, Inc. v. Safeway Opticians, Inc.* (1946), 68 U. S. P. Q. 332; *Safeway Stores, Inc. v. Safeway Const. Co., Inc.* (S. D. Cal. 1947), 74 F. Supp. 455.

The Big Boy and Fairway Cases Do Not Sustain the Decision of the Court Below.

In the *Big Boy* case (9th Cir. 1955), 229 F. 2d 154, 155, the question of competition was not alleged or involved. The complaint averred that plaintiff conducted a drive-in restaurant where he sold double-decker sandwiches under the name “Big Boy”; that the defendant was engaged in manufacturing barbecue equipment under the name “Big Boy Manufacturing Company,” and that the similarity of names led to confusion as to the source of manufacture of defendant’s equipment. The court below dismissed the action. This Court reversed, solely upon the ground that the allegation as to confusion of identity of manufacture entitled the plaintiff to relief if he could prove that averment. If any possible bearing on the question of competition can be found in the decision of this Court, it necessarily implies that competition is not necessary.

The *Fairway* case (9th Cir. 1955), 227 F. 2d 193, presented a situation entirely different from that of the case at bar. There, the plaintiff was engaged in Minnesota and several of the midwest states in the wholesale of food products. Nearly all of its merchandise was wholesaled to retail cooperative stores which it licensed to operate under the name of "Fairway Markets" and "Fairway Foods," all of said stores being in the Midwest or Northwest and none of them in or near California. The defendant opened a super market in Monterey Park, a suburb of Los Angeles, under the name of "Fairway Markets." The action was to enjoin the defendant from using the name "Fairway." The defendant filed a cross-complaint asking that if the plaintiff attempted to do business in California it be enjoined from doing so under its name. The District Court denied the relief sought by the plaintiff and granted that sought by the cross-complaint.

An examination of the opinion of Judge Westover reported in 118 F. Supp. 840, 842, will show that it was based upon the rule established in *Hanover Star Milling Company v. Metcalf* (1916), 240 U. S. 403, 415; 60 L. Ed. 713, 719, which he quoted:

"'. . . In the ordinary case of parties competing under the same mark in the same market, it is correct to say that *prior appropriation settles the question*. But where two parties independently are employing the same mark upon goods of the same class, *but in separate markets* wholly remote the one from the other, the question of prior appropriation is *legally insignificant*; unless, at least, it appear that the second adopter has selected the mark with some design inimical to the interests of the first user, *such as to take the benefit of the reputation of his goods, to forestall the extension of his trade, or the like.*'"

On appeal, this Court affirmed the portion of the decision denying the relief sought by the plaintiff, but reversed the injunction granted on the cross-complaint. Any casual or careful reading of this Court's opinion will show that it not only did not intend to depart from the well recognized rule that there need be no competition between the parties trading in the same area but intended to reaffirm that rule. In part, this Court said at page 196:

“ . . . It is true that unfair trade may result from the dilution of the business good will in ways not connected directly with the possible loss of a sale through deception or confusion, and this phase of unfair trade is well stated in *Yale Electric Corp. v. Robertson*, 2 Cir., 1928, 26 F. 2d 972, at page 974:”

The court then set out the major portion of the opinion in the *Yale* case which we have heretofore quoted, following the quotation with the citation of the *Stork* case (9th Cir. 1948), 166 F. 2d 348, which quoted at length from the *Yale* case and held in no uncertain terms that competition was not necessary.

In the *Stork* case, 166 F. 2d 348, it is stated at page 352:

“In California and elsewhere, a firmly established trade name *receives the same protection from the law as a trade mark.*”

In the *Stork* case this court also held that Sections 14,400, 14,401 and 14,402 of the California Business and Professions Code made a trade name a transferable property right, the invasion of which could be enjoined by any court of competent jurisdiction.

We think it is obvious that this Court quoted with approval from the *Yale* case and cited the *Stork* case for the express purpose of negating any idea that the affirmation of a portion of the judgment contained any indica-

tion of an abandonment or modification of the rule that in the same trading area competition was not necessary. If there can be any doubt of that—and we do not think there can be—it must be dispelled by the later decision of this Court in *North American Aircoach Systems, Inc. v. North American Aviation, Inc.* (9th Cir. 1955), 231 F. 2d 205, 211, where this Court said:

“ . . . Under the authorities, competition is not a condition precedent to the granting of an injunction.”⁶”

Footnote 6 reads as follows:

“*Phillips v. Governor and Company of Adventurers of England Trading into Hudson’s Bay*, 9 Cir., 79 F. 2d 971.”

In the *Phillips* case, this Court, in answer to the contention that the parties were not in competition, said (p. 974):

“ . . . This court, however, has carefully considered the question in *Del Monte Special Food Co. v. California Packing Corporation* (C. C. A.), 34 F. (2d) 774, and has held that the two products need not be competitive. Many authorities are there cited, to which may be added the following:” (Citing some ten decisions.)

Decisions of Other State and Federal Courts.

The decisions of this Court and of the California courts are so conclusive that the citation of decisions by other courts is undoubtedly carrying coals to Newcastle. However, decisions from other courts that competition is not necessary for the reasons stated in the *Yale* case can be cited almost without number.

We would call special attention to the decision of the Kentucky Court of Appeals in *Churchill Downs Distilling Co. v. Churchill Downs, Inc.* (1936), 262 Ky. 567; 90

S. W. 2d 1041 (hereafter referred to as *Churchill Downs* case) which, next to the *Yale* case and the decisions of this Court, above cited, is the most carefully considered opinion we have read upon this subject. We would also call attention to *Aunt Jemima Mills Co. v. Rigney & Co.* (2d Cir. 1917), 247 Fed. 407, 409, 410, 412, and *Tiffany & Co. v. Tiffany Productions, Inc.* (Sup. Ct. 1932), 147 Misc. 679, 682, 683; 264 N. Y. S. 459, 461, 462. Next to the *Yale* case, both of these cases (especially the first) are the most often cited by this and the California courts and the courts of other jurisdictions. Other well considered and often cited Federal and State cases are: *Standard Oil Company of New Mexico v. Standard Oil Company of California* (10th Cir. 1932), 56 F. 2d 973, 978, 979; *Duro Pump & Mfg. Co. v. California Cedar Products Co.* (D. C. Cir. 1926), 11 F. 2d 205, 206; *Hanson v. Triangle Publications* (8th Cir. 1947), 163 F. 2d 74, 78, 79; *Colorado National Company v. Colorado National Bank of Denver* (1934), 95 Colo. 386, 390, 391; 36 P. 2d 454, 455, 456.

California Decisions.

The California decisions are as conclusive as are those of this court. The leading California case undoubtedly is *Academy of Motion Picture Arts and Sciences v. Benson* (1940), 15 Cal. 2d 685; 104 P. 2d 650, hereafter sometimes referred to as *Academy of Motion Picture* case. In that case plaintiff alleged it was a nonprofit corporation organized for conferring awards upon motion picture companies and actors for outstanding achievements. It sought to enjoin the defendant for conducting a school for motion pictures under the name "Hollywood Motion Picture Academy." A demurrer was sustained upon the

grounds that there was no competition between the parties. In reversing the Supreme Court said:

“The decisions of the courts for the most part are concerned with the principles applicable to infringement and unfair competition in respect to businesses which are directly competitive. *But we perceive no distinction which, as a matter of law, should be made because of the fact that the plaintiff and the defendant are engaged in non-competing businesses.* In situations involving the use of proper surnames in non-competitive businesses it has been held that where confusion was shown as likely to result the relief should be accorded to the complaining party. (*Tiffany & Co. v. Tiffany Productions*, 237 App. Div. 801 [260 N. Y. Supp. 821] (affd. 262 N. Y. 482 [188 N. E. 30])); *Yale Electric Corp. v. Robertson*, 26 Fed. (2d) 972.) *Likewise it has been said that ‘without regard as to whether there is actual market competition between the parties for the same trade, it is sufficient if the unfair practices of the one will injure the other.’* (63 Cor. Jur., p. 390, and cases cited in note.)”

The foregoing decision has been followed in *Winfield v. Charles* (1946), 77 Cal. App. 2d 64; 175 P. 2d 69; *MacSweeney Enterprises, Inc. v. Tarantino* (1951), 106 Cal. App. 2d 504; 235 P. 2d 266; *Johnson v. Twentieth Century-Fox Film Corp.* (1947), 82 Cal. App. 2d 796; 187 P. 2d 474; *Moffat Company v. Koftinow* (1951), 104 Cal. App. 2d 560; 232 P. 2d 15.

We would call special attention to the opinion of Justice Vallée in *Johnson v. Twentieth Century-Fox Film Corp.* (1947), 82 Cal. App. 2d 796, 818; 187 P. 2d 474, 487, wherein it is pointed out that since the advent of radio and television, titles, slogans and names have become of

great value. In speaking of the *Academy of Motion Picture* case the court stated:

“The reasoning of the later cases is that use by another of the name or title *results in a dilution of its value to the original appropriator*. (*Tiffany & Co. v. Tiffany Production*, 147 Misc. 679 [264 N. Y. S. 459]. * * *)”

The California statutes are equally conclusive. Sections 14400, 14401 and 14402 of the Business and Professions Code read as follows:

“§14400. *Ownership*. Any person who has first adopted and used a trade name, whether within or beyond the limits of this State, is its original owner.

“§14401. *Transferability: Protection accorded*. Any trade name may be transferred in the same manner as personal property in connection with the good will of the business in which it is used or the part thereof to which it is appurtenant, and the owner is entitled to the same protection by suits at law or in equity.

“§14402. *Remedy for violation of rights*. Any court of competent jurisdiction may restrain, by injunction, any use of trade names in violation of the rights defined in this chapter.”

There can be no doubt that under the law of California an established trade name is a property right and that competition is not necessary to enable the appropriator of the name to enjoin anyone else from using it. Since the jurisdiction of the court below existed only because of diversity of citizenship, the law of California is controlling and the denial by the court below of the injunctive relief sought by the plaintiff was as contrary to the law of California as we have shown it to be to the decisions of this and other Federal Courts.

II.

The Court Was in Error in Holding That It Was Necessary to Show That the Defendant's Use of Plaintiff's Trade Name Had Confused Anyone. Further, the Findings of the Court That There Had Been No Confusion Were Contrary to the Evidence.

In Finding XIII [R. 79] the court found there had been no confusion by reason of the similarity of names, "and there is little likelihood of confusion so long as plaintiff continues to operate retail food and grocery markets and defendant continues to operate a retail furniture store."

The above finding, in and of itself, requires a reversal of the decree and an injunction in favor of the defendant. The finding, although negatively expressed, is, that there is some possibility, although slight, of confusion. That fact entitles the plaintiff to the relief prayed for even if it be conceded that the finding is correct that up to time of trial there has been no confusion.

In *MacSweeney Enterprises, Inc. v. Tarantino* (1951), 106 Cal. App. 2d 504, 512; 235 P. 2d 266, 271, the court said:

"Appellants next argue that no one could have been deceived by the challenged label. Anyone, so it is stated, of reasonable intelligence would know that the cocktail sauce was manufactured and marketed by the Bell company, and not by respondent. This, however, was a question of fact. *Proof of actual confusion is not necessary.* If the facts support the conclusion that a purchaser of ordinary intelligence could reasonably be confused, that is all that is required. (*American Distilling Co. v. Bellows & Co.*, 102 Cal. App. 2d 8 [226 P. 2d 751].) That is this case."

See, to the same effect: *National Van Lines, Inc. v. Dean*, 237 F. 2d 688, 691, decided by this Court October 18, 1956, and the California decisions therein cited and quoted; *Winfield v. Charles*, *supra* (1946), 77 Cal. App. 2d 64, 70; 175 P. 2d 69, 73; *Del Monte Special Food Company v. California Packing Corp.*, *supra* (9th Cir. 1929), 34 F. 2d 774, 777; *Sun-Maid Raisin Growers of California v. Mosesian* (1927), 84 Cal. App. 485, 497-498; 258 Pac. 630, 635.

In the first case cited, *National Van Lines, Inc. v. Dean*, *supra*, this Court held that where there is a similarity in sound or appearance of a trade name or emblem it must be held as a matter of law that confusion is liable to result, and that a finding of a trial court to the contrary must be disregarded.

It cannot be controverted that it is apt to cause confusion if the defendant is permitted to use the word "Safeway" in his trade name and to advertise his goods under the name of "Safeway" by using only that word, as he did once, and in other advertisements making it the most conspicuous portion of his name. Further, as before pointed out, if the defendant can use the word "Safeway" and advertise it as he has, any other retailer not selling vegetables and meats can do the same. It is self-apparent that such use by a large number of retailers would cause confusion. It is even more apparent that such use by a large number of retailers not engaged strictly in the sale of foods would cause the loss of identity in the secondary meaning of the words "Safeway" as indicating the plaintiff and the merchandise it sells. *It is certain that it would greatly dilute, if not destroy, the good will value which the plaintiff has created in its trade name.*

Also, to predicate denial of injunctive relief to plaintiff upon the foregoing finding would unduly limit the plaintiff's right to expand its business. Since the court's find-

ing or conclusion that at present there was only a slight possibility of confusion is predicated upon plaintiff "continuing to operate retail food and grocery markets and defendant continuing to operate a retail furniture store." There would be certainty of confusion if the plaintiff increased, as it well might do, the lines of household furniture it sells and the defendant added to his merchandise, as he well might do, the same or similar lines of furniture or household equipment as the plaintiff sold.

In *National Van Lines, Inc. v. Dean*, *supra*, this Court, quoting and citing from *MacSweeney Enterprises, Inc. v. Tarantino*, *supra*, said:

"Unfair competition is proscribed by statute in California, and may be enjoined. The deceptive use of a similar name, or the emblematic representation of such name by a competitor, is unfair competition. It is not necessary to prove fraud, since the California statute, as amended in 1933, refers to 'unfair or fraudulent business practice.' (Emphasis supplied.)

"Nor is it necessary to prove that any person has been confused or deceived; it is sufficient that there is a likelihood of deception."

From the remarks of the court below during argument, we are certain that it was the court's opinion that before he could grant plaintiff any relief there must be some direct evidence of confusion resulting from the use by defendant of the word "Safeway." These remarks are not in the record, but we believe the Memorandum of Opinion discloses that the court held that view:

". . . There is no evidence in this case that there has been any confusion between the two stores, as no one testified they went into defendant's store thinking it was plaintiff's or vice versa; and there has

been no evidence that defendant at any time attempted to 'palm off' any of his merchandise as being that of plaintiff." [R. 56.]

In the situation of the instant case confusion at the customer level would be almost impossible to show. Very few, if any, customers going into plaintiff's self-service stores would be apt to mention the defendant's store and it would be difficult if not impossible to show that any of defendant's customers had initially gone to its store because of being misled by its name or advertisements, although undoubtedly a number of them had been.

The remarks of the Second Circuit in *Miles Shoes, Inc. v. R. H. Macy & Co., Inc.* (1952), 199 F. 2d 602, 603; cert. den. 345 U. S. 909; 97 L. Ed. 1345, in reversing the decree of the District Court directing the Commissioner of Patents to register a confusingly similar trade mark as to hosiery, are pertinent:

"Moreover, since reliable evidence of actual instances of confusion is practically almost impossible to secure, *particularly at the retail level*, in the final analysis the decision must rest on the court's conviction as to possible confusion."

In *Gehl v. Hebe Co.* (7th Cir. 1921), 276 Fed. 271, 272-273, the court said:

" . . . The general form and sound of the words, having marked similarity, would strongly suggest the likelihood of confusion. Although there was here no evidence of actual confusion on the part of customers, this is not easily available, *nor indeed necessary* where the words themselves suggest it."

See, also, to the same effect: *Cozier v. Economy Cash Stores, Inc.* (1951), 71 Ida. 178, 190; 228 P. 2d 436, 443.

It cannot be said that the defendant's advertisements were not such as to be apt to lead the casual reader to believe that the defendant's store was a branch of or sponsored by plaintiff. Conceding the average person who went to defendant's store under such belief would be disillusioned on his entering the store, being there he would probably make purchases. *It is perfectly obvious that the defendant's advertisements were for the purpose of producing exactly this result, thus allowing him to profit from the good will which the plaintiff has created in the name "Safeway."*

It is settled that the fact plaintiff has not been damaged or lost any sales is immaterial; that in equity and good conscience one may not trade upon the good will that another has built up, even though that other is not damaged.

In the *Stork* case, *supra*, 166 F. 2d 348, 357, this Court said:

"(a) '*Reaping Where One Has Not Sown.*'"

The decisions frequently refer to this sort of imitation as '*reaping where one has not sown*' or as '*riding the coattails*' of a senior appropriator of a trade name.

By whatever name it is called, equity frowns upon such business methods, and in proper cases will grant an injunction to the *rightful user of the trade name.*"

To the same effect see: *Del Monte Special Food Co. v. Californina Packing Corporation* (9th Cir. 1929), 34 F. 2d 774, 775; *Yale Electric Corporation v. Robertson* (2d Cir. 1928), 26 F. 2d 972, 973; *Churchill Downs Distilling Co. v. Churchill Downs, Inc., supra* (1936), 262 Ky. 567, 572; 90 S. W. 2d 1041, 1043; *Hanson v. Triangle Publications* (8th Cir. 1947), 163 F. 2d 74, 78; *Colorado National Company v. Colorado National Bank of Denver* (1934), 95 Colo. 386, 391; 36 P. 2d 454, 456; *Tiffany & Co. v. Tiffany Productions, Inc.* (Sup. Ct. 1932), 147 Misc. 679, 681; 264 N. Y. S. 459, 461.

In the *Del Monte* case, *supra*, 34 F. 2d 774, 775, it is said:

“ . . . Thus every effort made by the appellee to increase the volume and variety of its products and maintain its high standard of quality by its systematic and expensive advertising campaign and by care in the preparation of its products redound to the benefit of the appellant, which does not contribute in any manner to the expenditures involved in this vast undertaking, and whose only motive for the adoption of the same ‘brand’ is to get the advantage of appellee’s name, reputation, and good will.”

In the *Churchill Downs* case, *supra* (1936), 262 Ky. 567, 573; 90 S. W. 2d 1041, 1044, it is said:

“The right of Churchill Downs, Inc., to the exclusive use of the name ‘Churchill Downs’ is property in a qualified sense (*Stratton & Terstegge Co. v. Stiglitz Furnace Co.*, 258 Ky. 678, 81 S. W. (2d) 1), which equity by injunctive relief will protect from another’s intentional use for the purpose of

deriving a profit from its reputation, without proof of special damages. Armstrong v. Kleinhans, 1 Ky. Law. Rep. 112."

As we have seen, the above equity rule has been embodied in the California Business and Professions Code in Sections 14,400, 14,401 and 14,402.

Further argument of the subject is unnecessary in view of the clarity of the decisions of California (which are controlling) and of this and all other courts of which we are aware that it is not necessary to show any confusion.

In *Sun-Maid Raisin Growers of California v. Mosesian* (1927), 84 Cal. App. 485, 497-498; 258 Pac. 630, 635, the court said:

"And in the case of *T. A. Vulcan v. Myers*, 139 N. Y. 364 (34 N. E. 904), it is said: '*No evidence was given or offered (in this case) to show that any person had actually been deceived by the limitation of the plaintiff's trade-mark, and we think that none was necessary for the maintenance of the action. It is the liability to deception which the remedy may be invoked to prevent. It is sufficient if injury to the plaintiff's business is threatened, or imminent to authorize the court to intervene to prevent its occurrence. The owner is not required to wait until the wrongful use of his trade-mark has been continued for such a length of time as to cause some substantial pecuniary loss.*'"

To the same effect, *Winfield v. Charles, supra* (1946), 77 Cal. App. 2d 64, 70; 175 P. 2d 69, 73; *Pastificio Spiga Societa Per Azioni v. De Martini Macaroni Co.,*

Inc. (2d Cir. 1952), 200 F. 2d 325, 327; *Miles Shoes, Inc. v. R. H. Macy & Co., Inc.*, *supra* (2d Cir. 1952), 199 F. 2d 602, 603; cert. den. 345 U. S. 909; 97 L. Ed. 1345; *LaTouraine Coffee Co., Inc. v. Lorraine Coffee Co., Inc.* (2d Cir. 1946), 157 F. 2d 115, 117; cert. den. 329 U. S. 771; 91 L. Ed. 663; *Admiral Corp. v. Penco, Inc.* (2d Cir. 1953), 203 F. 2d 517, 520; *Churchill Downs Distilling Co. v. Churchill Downs, Inc.*, *supra* (1936), 262 Ky. 567, 571; 90 S. W. 2d 1041, 1043; *Hanson v. Triangle Publications, Inc.* (8th Cir. 1947), 163 F. 2d 74, 79-80; *Bissell Chilled Plow Works v. T. M. Bissel Plow Co.* (W. D. Mich. 1902), 121 Fed. 357, 366; *William R. Warner & Company v. Eli Lilly & Company* (1924), 256 U. S. 526, 530; 68 L. Ed. 1161, 1164; *Florence Mfg. Co. v. J. C. Dowd & Co.* (2d Cir. 1910), 178 Fed. 73, 75; *Ohio Baking Co. v. National Biscuit Co.* (6th Cir. 1904), 127 Fed. 116, 120.

In the *Stork* case, *supra*, 166 F. 2d 348, 359, it is said:

“The appellees stress the fact that the appellant has failed to show ‘that appellees’ operation in any way has injured appellant’, etc.

“Neither under the California jurisprudence nor under the general law is such showing necessary. *The California decisions, indeed are overwhelmingly in accord on this point.*”

III.

The Court Erred in Not Granting Plaintiff Injunctive Relief as to the Improper Advertising of Defendant's Business as "Safeway" and Erred in Its Finding That the Defendant's Improper Advertising Was Not for the Purpose of Trading Upon Plaintiff's Good Will and Was Not Calculated to Deceive, and Erred in Preventing Plaintiff From Introducing Evidence as to the Damaging Misleading and Deceptive Character of the Advertising.

The court in Findings X, XI and XII [R. 78-79], in effect found there was no similarity between the advertisements of the plaintiff and those of the defendant. These findings are directly contrary to the advertisements themselves. The defendant's advertisement in the Van Nuys News of November 16, 1952, reads:

"SAFEWAY is open SUNDAYS 11 A.M. to 5 P.M. Save on Sunday 6416 Van Nuys Blvd. STate 0-4371." [Ex. "M" of the Requests for Admissions Folder.]

There is no other exhibit showing the use of the word "Safeway" only, but an examination of the various other advertisements will show that "Safeway" is always the dominant feature of the advertisement, being always in larger and more conspicuous letters than either "Furniture" or "Furniture Company." The predominance of the word "Safeway" varies in the advertisements, but all are of a character to show that the defendant was attempting to advertise his business under plaintiff's trade name.

It is unnecessary and would unduly prolong this brief to comment on the various advertisements. They speak

for themselves. But we would call attention especially to Exhibits 1, 2 and 3. Exhibit 1 consists of two advertisements of September 3, 1951, each a full page, the first of the defendant and the second of the plaintiff; Exhibit 2, two similar advertisements of July 22, 1954, of a page each of the plaintiff and defendant; and Exhibit 3, a page advertisement of August 4, 1954 of the defendant.

An examination of Exhibit 1 will show that defendant's advertisement of "Safeway" was in exactly the same block letters as that of the plaintiff only larger, and although "Furniture Company" appeared below it in very small letters and would not be noticed without careful reading. The same is true of Exhibits 2 and 3, although "Safeway" is in slightly smaller letters than in Exhibit 1.

Assuming, contrary to what we have demonstrated, that the defendant had a right to include "Safeway" in the fictitious name under which he did business, he did not have the right to advertise his business under that name alone or to make it the most dominant part of his advertisement. "Safeway" was shown by the evidence and found by the court to be the defendant's trade name. It was held in the *Stork* case, *supra*, 166 F. 2d 348, 352, that under the Statutes of California a trade name is entitled to the same protection as a trade mark.

Even if the defendant were entitled to use "Safeway" in the fictitious name under which he did business merely because he was not selling the same line of furniture as that handled by the plaintiff, it is certain he did not have a right to use or advertise "Safeway" as the name of his store. That he was doing so to trade upon the good will of Safeway, and especially the good will that it might develop by its advertisements for the articles of household equipment it sold, is so obvious that Findings

X, XI and XII must be disregarded as unsupported by and contrary to the evidence.

In its prayer for relief, plaintiff sought to enjoin the defendant from the improper use and improper advertisement of the word "Safeway." The court, at the conclusion of plaintiff's evidence, clearly stated he had no power to grant such relief.

We quote the colloquy between court and counsel on this subject:

"Mr. Magid: The plaintiff is asking for a permanent injunction.

"The Court: For the use of the word Safeway.

"Mr. Magid: No, and in the alternative, page 14, line 32, he is asking for an alternate injunction against using any name Safeway in such a way or manner as to imitate the word Safeway.

"The Court: It has nothing to do with the case. I am not going to tell you how he can dictate to the newspaper what type they are going to use, whether dark space, light space, or not.

"Mr. Magid: That is what the plaintiff is asking for.

"The Court: I can't do that." [R. 208-209.]

Nothing could be more erroneous. If anything is settled, it is that one cannot use a name that is common property and which any one may use in such a way and manner as to imitate a trade mark or trade name of another or to indicate that his goods are those of another.

The decisions in *Singer Manufacturing Company v. June Manufacturing Company* (1896), 163 U. S. 169, 186, 204; 41 L. Ed. 118, 125, 131, and *Singer Manufacturing Company v. Bent* (1896), 163 U. S. 204, 206; 41 L. Ed. 131, 132, hereafter referred to as "the Singer

Sewing Machine cases” should be sufficient. In each of those cases the Supreme Court held that when the patent on the Singer Sewing Machine expired “Singer” became a generic term indicating a sewing machine of the character made under the patent. But that fact did not give persons other than the Sewing Machine Company the right to imitate the use by the plaintiff company of the word “Singer” or to use it in such a way that a purchaser might be led to believe the Singer Sewing Machine he was purchasing was manufactured by the Singer Sewing Machine Company.

Although very early decisions, they have never been departed from but have been consistently followed.

Authorities can be cited almost without limit that a name or word which is incapable of exclusive appropriation or which has become common property and which anyone can use, including a party’s own name, cannot be used in a manner that would imitate the use of the same name or word by a former user or appropriator thereof. See: *Jackman v. Mau* (1947), 78 Cal. App. 2d 234, 242; 177 P. 2d 599, 604; *MacSweeney Enterprises, Inc. v. Tarantino* (1951), 106 Cal. App. 2d 504; 235 P. 2d 266; *McLean v. Fleming* (1878), 96 U. S. 245; 24 L. Ed. 828; *L. E. Waterman Co. v. Modern Pen Co.* (1914), 235 U. S. 88; 59 L. Ed. 142; *Horlick’s Malted Milk Corporation v. Horlick’s, Inc.* (9th Cir. 1932), 59 F. 2d 13; *La Republique Francaise v. Saratoga Vichy Springs Co.* (2d Cir. 1901), 107 Fed. 459, 462; aff’d 191 U. S. 427, 440; 48 L. Ed. 247, 254 (hereafter sometimes referred to as the “Vichy case”); *Saxlehner v. Eisner & Mendelson Company* (1900), 179 U. S. 19, 40, 41; 45 L. Ed. 60, 76, 77; *Sunbeam Lighting Co. v. Sunbeam Corporation* (9th Cir. 1950), 183 F. 2d 969, 971, 972, and *Sunbeam Furniture Corporation v. Sunbeam Corporation* (9th Cir. 1951), 191 F. 2d 141, 144, hereafter referred to as “the

Sunbeam cases"; *Mershon Company v. Pachmayr* (9th Cir. 1955), 220 F. 2d 879, 883.

In the first case cited, where the trade name of the plaintiff was "Jackman" and the defendant's name was "Jack Mau," the court said:

" . . . Equity will not countenance the use by respondent of the trade name 'Jackmau,' *written in script form and similar to the manner in which appellants' long possessed trade name is written* because respondent may thereby reasonably confuse and deceive the buying public into the belief that his is a 'Jackman' retail store."

Jackman v. Mau, 78 Cal. App. 2d 234, 242; 177 P. 2d 599, 604.

In *La Republique Francaise v. Saratoga Vichy Springs Co.*, *supra* (2d Cir. 1901), 107 Fed. 459, the plaintiff, as the original adopter of the word "Vichy," sought to enjoin the use of it by the defendants. The plaintiff's water was bottled in France from springs near Vichy, the defendant's in New York from springs near Saratoga. The defendant had adopted a label on which the name "Vichy" was printed in very conspicuous type underneath "Saratoga" in less conspicuous type. It was held by the Second Circuit that "Vichy" had become common property and that anyone could use it, but that the defendant should be enjoined from printing the word "Vichy" in any larger or different type than the word "Saratoga." While the decision of the Circuit Court as to the right of the defendant to use "Vichy" was reviewed by the Supreme Court and affirmed (191 U. S. 426; 48 L. Ed. 247), the defendant did not seek a review of the injunction against it requiring it to print the word "Saratoga" in as large and the same type as "Vichy."

In the *Sunbeam* cases (183 F. 2d 969, 971; 191 F. 2d 141, 144), this Court held that Sunbeam was a descrip-

tive word not capable of being exclusively appropriated either as a trade name or trade mark; hence the plaintiff could not enjoin the defendant from using the word "Sunbeam" in its corporate name but could enjoin it from using the word "Sunbeam" and "Master" upon lamps which it made. Also, that the defendant could be enjoined from using the word "Sunbeam" in script similar to that of the plaintiff, saying in the first case:

"We recognize that a non-fanciful word may be used by one business enterprise as its trade-mark and as its trade-name in circumstances where its unqualified use by another may constitute infringement or unfair trade. Such principle comes into play in this case *as against defendants in their use of the script form of the word Sunbeam and in the combination of the words Sunbeam and Master.*"

Sunbeam Lighting Co. v. Sunbeam Corporation,
183 F. 2d 969, 971-972.

It is certain that the court was in error in holding that if the defendant had a right to include "Safeway" in its fictitious name he could not be enjoined from the improper advertisement of that word.

THE COURT ERRED IN FINDINGS IX AND X TO THE EFFECT THAT DEFENDANT'S ADVERTISEMENTS WERE NOT FOR THE PURPOSE OF TRADING UPON THE GOOD WILL PLAINTIFF HAD CREATED FOR SAFEWAY AND ERRED IN DECLINING TO PERMIT DEFENDANT TO BE EXAMINED ON THE SUBJECT BY PLAINTIFF.

As heretofore stated, the Court found in Findings IX and X [R. 77-78] that the defendant's use of the word "Safeway" in its advertisements was not for the purpose of trading upon plaintiff's good will, and in Finding XI that the word "Safeway" was not given undue promi-

nence in the advertising and that said advertisements were not for the purpose of “trading upon the name, reputation and standing of the plaintiff.” [R. 78-79.]

There is absolutely no evidence in the record to sustain the above findings. The defendant was examined on that subject by his counsel, and the questions asked him, to which he gave a negative answer, were:

“Q. (By Mr. Magid): Have you used the name Safeway Furniture for the *sole* purpose of trading upon the good will of the plaintiff in this case?

* * * * *

“Q. (By Mr. Magid): Have you ever used the name Safeway Furniture Store or Safeway Furniture Company for the *sole* purpose of trading upon the good will of the plaintiff, Safeway Stores?” [R. 206.]

There is no other testimony in the record that would even suggest the correctness of the above Findings. Certainly, the fact that defendant did not adopt the name “Safeway” or make it the most prominent of his advertising for the *sole* purpose of trading upon plaintiff’s good name is not sufficient. If that was one of his objects it was improper.

Even if the questions had been differently framed and defendant had said that trading on the good will plaintiff had developed for Safeway was not an object at all, his testimony would have to be disregarded. His actions speak louder than words. If he did not have the idea of capitalizing on the good will attaching to “Safeway,” *why did he make it the most dominant part of his advertisements?*

We Shall Await Defendant's Reply With Interest.

The observations of the Second Circuit in *Miles Shoes, Inc. v. R. H. Macy & Co., Inc.*, *supra* (1952), 199 F. 2d 602, 603; cert. den. 345 U. S. 909; 97 L. Ed. 1345, are most pertinent:

“Miles sought registration of its trade mark in 1945 when it had only been using it for about three months. Why it should have chosen a mark that had long been employed by Macy and had become known to the trade instead of adopting some other means to identify its goods is hard to see *unless there was a deliberate purpose to obtain some advantage from the trade which Macy had built up*. It seems unlikely that Miles would have suffered any loss if it had avoided the use of a confusing symbol and we believe that it should employ some fairer means for designating its product. *Even though the decision below purports to uphold defendant Macy's trade mark, it permits competition from one so much like it as effectually to destroy any vitality to the Macy mark.*”

However, the court below committed the most obvious and flagrant error in refusing to allow plaintiff to examine the defendant upon his reason for using “Safeway.” Plaintiff, as part of its case, called the defendant under the provisions of Rule 43(b), and after he testified that he had not known that plaintiff's name was other than “Safeway,” plaintiff attempted to examine him as follows:

“Q. You knew, didn't you, that they had built up a very high and valuable good will under that name?”

“Mr. Magid: If your Honor please, I think we are definitely getting into the realm of argument.

“The Court: Make your objection.

“Mr. Magid: I object to the question on the ground it is argumentative.

"The Court: Objection sustained. I will take judicial knowledge, Mr. Sterry, that Safeway has built up a valuable asset of good will in this community, extending back over the years 1952, 1953, and before.

"Mr. Sterry: I understand, but I still think we have a right to show he knew that. One of our charges is that he adopted this name just for the purpose of trading on it.

"The Court: He didn't adopt the name, Mr. Sterry. The name was there. He bought it.

"Mr. Sterry: Well, all right, even if he bought it, under the decisions, that is enough.

"The Court: He didn't adopt the name. * * *"
[R. 188.]

We are unable to conceive of any justification for the court's ruling. The court apparently thought that because defendant purchased an interest in a store that was already using plaintiff's trade name he had a right to continue the use of that name.

As we have seen, the decisions of this and the California courts are unanimous in holding that the California statutes make a trade name a property right. True, it is an intangible right, but the right of protection and transfer are the same as to intangible as they are to tangible property.

We apprehend that if the suit had been to recover tangible property belonging to plaintiff in defendant's possession it would be no defense that defendant had bought it from someone who had illegally taken it from the plaintiff.

The court's ruling cut off the plaintiff from any possible cross-examination of defendant on that very important subject and was obviously erroneous.

The foregoing observations apply equally to the balance of Finding IX wherein the Court found that the plaintiff did not continue the use of Safeway for the purpose of trading upon the good will that plaintiff had developed for that name, but because it would entail considerable expense to change the neon and electric light signs, stationery, etc. [R. 77-78]. The Court does not conclude that those facts would justify the unlawful use of plaintiff's trade name, but the Court must have thought they were of some importance to have incorporated them in its findings. Clearly, one is not justified in either adopting or continuing the use of another's trade name because it will be expensive to discontinue such wrongful trespass upon the right of another. As a matter of fact, the removal of defendant's neon sign "Safeway" and the changes of stationery would have cost far less than the defense of this suit.

THE COURT ERRED IN SUSTAINING THE OBJECTION OF
THE DEFENDANT TO PLAINTIFF'S ATTEMPT TO SHOW
THE CONFUSING NATURE OF DEFENDANT'S ADVERTISING.

Finding XII reads [R. 79]:

"It is not true, as alleged in Paragraph XXXII that the defendants' use of the name Safeway Furniture Co. caused or will cause the public to believe that the standards of plaintiff's business conduct and the quality of plaintiff's goods or services have fallen or will fall through any act of the defendant."

The record shows that the plaintiff endeavored to prove by Mr. Bauer, President of the Better Business Bureau, and Mr. White, Secretary-Manager of the Southern California Retail Grocers Association, that the defendant's advertising, especially as shown by Exhibits 1, 2 and 3, would be damaging to the plaintiff in this: that if the defendant were allowed to continue to advertise his store

and merchandise as "Safeway," customers or prospective customers were liable to refer to transactions in defendant's store as having occurred in "Safeway," and any disparaging remarks about Safeway would be detrimental to plaintiff [R. 95-97, 169-170]. On defendant's objection, the court refused to permit the evidence [R. 95, 97, 169-170].

We think it is obvious that either Finding XII of the court was erroneous and unsupported by the evidence or that the court was in error in rejecting plaintiff's proffered evidence. Actually, the court was in error both in its finding and its rejection of the proffered evidence.

Of course, the advertisements spoke for themselves in the sense that one could look at them and see what they advertised. There can be no controversy that in defendant's advertisements, especially in the advertisements shown in Exhibit 1, "Safeway" was the dominant word. If the defendant could so advertise, necessarily any other retailer could do likewise. If the defendant's business and that of other retail merchants became known as "Safeway," it seems to us obvious that any adverse comments as to the business or dealings of any merchant doing business under the name of Safeway must necessarily redound to the discredit of the plaintiff. Perhaps that is another way of stating the principle announced in the *Yale* case, that if a newcomer were permitted to use a well-known trade name he could easily tarnish it.

One thing is quite certain: If it cannot be said as a matter of law that the defendant's advertisements would damage the plaintiff, then the plaintiff had a right to introduce proof showing how and in what manner defendant's advertisements would damage it. If it can be said as a matter of law,—as we think it can and must be,—that the necessary effect of defendant's advertising would damage the plaintiff, then obviously Finding XII is without evidentiary support and erroneous.

IV.

The Use by Others of the Name "Safeway" Did Not Justify the Court in Denying Plaintiff the Relief Which It Sought or in Concluding That the Protection of Plaintiff's Trade Name Is Limited to Retail Merchants Selling Articles Usually Found in Grocery Stores or Food Markets.

As heretofore stated, the only two serious defenses relied on in the court below were the lack of competition and the use of "Safeway" by others. Although, the court made no formal finding or conclusion thereon, it intimated in its opinion, which, by conclusion X [R. 81], is purported to be made a part of the Findings of Fact and Conclusions of Law, that the use by others of the name "Safeway" was the basis for the court's conclusion as to the limitation of its protection. In its opinion the court said:

"In the case at bar the Court is of the opinion plaintiff is entitled to protection of its name 'Safeway' within the retail food and grocery industry in Southern California. The only question is whether defendant Safeway Furniture Co., Inc., comes within the area of protection. Although plaintiff and its predecessors have been using the name 'Safeway' since 1925, nevertheless, over the years the name has been used many, many times in other businesses. In 1925 there was a 'Safeway Cleaners and Dyers,' in 1926 a 'Safeway Auto Finance Co.' and a 'Safeway Loan Company.' Since 1925 there have been approximately ninety-six listings with the County Clerk of Los Angeles County of fictitious or corporate names in which the name 'Safeway' appears. An examination of the June, 1956, Central Directory of the Los Angeles Telephone Exchange indicates twenty firms now using the word 'Safeway' in their titles." [R. 58-59.]

It will be noted that apparently none of the concerns mentioned by the court as using "Safeway" were in the retail business as that term is usually understood.

While the defendant stipulated as to the number of filings during the past thirty-one years with the County Clerk of fictitious or corporate names in which "Safeway" appeared such stipulation was subject to the admissibility of the facts stipulated to. The court overruled the plaintiff's objection to the introduction of the stipulation,—we think improperly. The mere fact that a certificate of a fictitious name is filed with the County Clerk is no evidence that the name was ever actually used, or of the character of business carried on by the persons using such fictitious name, or the use made of any part of the fictitious names. No evidence as to these facts was offered by the defendant and the record is absolutely silent whether any of the persons filing certificates of fictitious or corporate names containing "Safeway" ever did any business, or the character of business they did.

The evidence was uncontradicted that the use by others of the name "Safeway" had not made any public impression or diluted in any degree the secondary meaning of "Safeway" as being the plaintiff, its chain of stores and the merchandise sold in the stores.

Mr. Bauer, President of the Better Business Bureau, testified:

"Q. Do you know of your own knowledge, confining it to this vicinity, Los Angeles County, whether the plaintiff, Stores, Incorporated, has used any one word or insignia as advertising? A. I know for many years their signature on their advertising has been just simply Safeway.

“Q. In all your business or transactions, have you ever known of any other concern than the plaintiff that has been known by that single word, Safeway? A. Not that I recall, although I know the name Safeway has been used in a few instances, but I know none *where it has been used by a retail store here.*

“Q. *In all your experience, do you know of any other concern that has attempted to advertise as Safeway?* A. No.” [R. 91-92.]

Mr. Sample, the Vice-President of the Better Business Bureau, and Mr. Carothers, President of the Food Employers Council, Incorporated, both testified to the same effect [R. 103-104, 173], Mr. Carothers stating that the only recollection he had of any other person using “Safeway” was that he had seen it once upon a van [R. 173].

Mr. White, Secretary and Manager of the Southern California Retail Grocers Association testified:

“Q. Now, Mr. White, either now or during any of the time that you have been secretary of this association, have you ever heard or known yourself of any other persons or concerns, by that I mean corporations or partnerships, doing business under the name of Safeway, other than the plaintiff? A. To the best of my knowledge, I believe not, sir, until this matter was brought to my attention.

“Q. If there has been, it has been so slight it didn’t register with you? A. *That is correct.*” [R. 169.]

There was not a syllable of testimony to contradict the foregoing. Mr. Heller, the former manager of the Los Angeles Division from 1949, testified that he was

not conscious of the use of the word "Safeway" by others except in one instance in San Diego and one or two others that he had reported to the Legal Department [R. 119-120].

It is too well settled by the decisions of this and all other courts that the mere use by others of a trade name is no defense to an action of this character that further argument is unnecessary.

In the *Dunnell* case, *supra* (9th Cir. 1949), 172 F. 2d 649, 654, this court said:

" 'Safeway' is a coined word not appearing in the dictionary. *That others may have used it does not prevent its acquiring a secondary meaning, . . .* "

In the *Del Monte* case, *supra* (9th Cir. 1929), 34 F. 2d 774, 777, this Court said:

"The appellant relies on the use of the name 'Del Monte' by others upon products sold in grocery stores, such as 'Del Monte flour,' 'Del Monte flake biscuits,' one of a number of varieties of biscuits manufactured by Standard Biscuit Company of San Francisco, 'Del Monte Creamery,' dealing in milk, butter, eggs, and cheese, and 'Del Monte Coffee.' It is sufficient with reference to such use of the name 'Del Monte' upon food products by others to say that, whatever may be the respective rights of the appellee and these other users of the name 'Del Monte,' *such use does not justify the appellant in its more recent use of appellee's well-known mark upon a new and different product recently produced by it; for, as has been stated, the question involved here is not the infringement of a trade-mark in which the prior use by others would be material, but is that of the adoption by the appellant of unfair*

the appellee, notwithstanding the use of the brand by others, even if such use by others preceded the use by appellee."

Cases from other jurisdictions *ad infinitum* might be cited. The most carefully and best reasoned of those decisions is the *Churchill Downs* case, *supra* (1936), 262 Ky. 567, 575; 90 S. W. 2d 1041, 1045. In that case the plaintiff and its predecessors in interest for a great number of years had been operating a race track, and the name "Churchill Downs" had acquired a secondary meaning as indicating the plaintiff. The action was to restrain the defendant (appellant) from using the name "Churchill Downs" in the manufacture and sale of bourbon whiskey. While the defendant (appellant) in that case relied, as does the defendant here, on the fact that there was no competition between the parties, it also relied equally upon the use of "Churchill Downs" by a large number of other persons and firms. In rejecting that defense and affirming the judgment of the court below enjoining the defendant from using "Churchill Downs," the court said in part:

" . . . Its evidence establishes that the name 'Churchill Downs' has been used by persons and companies other than Churchill Downs, Inc., in an entirely different business from that of Churchill Downs Distilling Company and of Churchill Downs, Inc.; that Levy Brothers engaged in business at Third and Market streets, Louisville, Ky., advertised and sold 'Churchill Downs' hats; 'Churchill Downs Post' No. 2921, at Fourth and 'M' streets, Louisville, Ky., sold tickets for a 'Bingo'; the General Tobacco Company registered with the United States

Patent Office in 1922, the name 'Churchill Downs' for cigars, smoking tobacco and leaf tobacco; Levy Brothers registered with the United States Patent Office the name 'Churchill Downs' for women's, men's and children's hats and caps; Abercrombie & Fitch Company, Forty-Fifth and Madison streets, New York City, registered with the United States Patent Office the name 'Churchill Downs' for walking-stick seats, canes, parasols, and umbrellas; and it is clearly established that the public had not been induced to buy the goods of the Churchill Downs Distilling Company under the belief they were manufactured by Churchill Downs, Inc.

"The use of the name 'Churchill Downs' by *other persons or corporations is no shielding defense to the distilling company's use of it.*"

With how much greater reason can it be said in the instant case that the inclusion of the name "Safeway" in the corporate or fictitious name of other concerns than retailers (with the possible exception of one or two very insignificant stores) does not give the defendant the right to conduct a retail establishment under plaintiff's trade name of "Safeway," and especially does not permit him to advertise his merchandise under plaintiff's trade name.

If further authority is necessary, see: *Actiengesellschaft Vereinigte Ultramarin-Fabriken v. Amberg* (3rd Cir. 1901), 109 Fed. 151, 152; *Ward Baking Co. v. Potter-Wrightington, Inc.* (3rd Cir. 1924), 298 Fed. 398, 404; *Ford Motor Co. v. Ford Insecticide Corporation* (E. D. Mich. 1947), 69 F. Supp. 935, 937; *New*

York World's Fair 1939, Inc. v. World's Fair News, Inc. (Sup. Ct. 1937), 163 Misc. 661, 666; 297 N. Y. Supp. 923, 929; *National Picture Theatres, Inc. v. Foundation Film Corporation* (2d Cir. 1920), 266 Fed. 208, 211; *State ex rel. Cohen v. Hinkle* (1926), 139 Wash. 651, 653; 247 Pac. 1029, 1030; *Thomas A. Edison, Inc. v. Shotkin* (D. Colo. 1946), 69 F. Supp. 176, 179; App. dismissed 163 F. 2d 1020; *Acme Chemical Co. v. Dobkin* (W. D. Pa. 1946), 68 F. Supp. 601, 613.

In the last case cited the court said:

“Counsel has brought to the Court’s attention a long list of corporations which appear in the Pittsburgh Telephone Directory which have the word ‘Acme’ in their corporate names. The list could doubtless be definitely lengthened if consideration is given to the companies doing business with the word ‘Acme’ in their names in Western Pennsylvania generally, which comprises twenty-four counties. *However, if a wrong has been done to the plaintiff in this action, it cannot be redressed or condoned by wrongs done by others.*”

In *Thomas A. Edison, Inc. v. Shotkin, supra* (D. Colo. 1946), 69 F. Supp. 176, 179, the court said:

“ . . . The plaintiff should in justice be permitted to select those places where it stood to suffer the greater damage *in lieu of making a mass attack upon all offenders at an enormous expense.*”

IN ANY AND ALL EVENTS, THE PLAINTIFF WAS ENTITLED TO THE EXCLUSIVE USE OF ITS TRADE NAME IN THE RETAIL FIELD, AND THE USE OF "SAFEWAY" BY NON-RETAILERS WOULD NOT JUSTIFY THE COURT IN PERMITTING ANOTHER RETAILER TO CARRY ON HIS BUSINESS AND ADVERTISE HIS MERCHANDISE UNDER THE PLAINTIFF'S TRADE NAME "SAFEWAY."

In its Memorandum Opinion the court stated:

"It was plaintiff's original contention that it had the exclusive right to the use of the name 'Safeway.' . . . In its brief plaintiff now contends it can prevent any other retail establishment from using the word 'Safeway,' even though such establishment is not in direct competition with plaintiff.

"The problem thus presented to the Court is rather simple—Can the plaintiff monopolize the word 'Safeway' in relation to retail trade in Southern California in the absence of competition?" [R. 56.]

The foregoing seems to imply that the plaintiff changed its position at the trial. Of course, it did nothing of the kind. If the court so interpreted our brief it entirely misinterpreted it.

At the outset of the trial the court had commented upon the alleged use of the word "Safeway" by others and had strongly intimated that it was a word of common and general use [R. 129-145]. The court even suggested to counsel for the defendant that he check the telephone directories of 1925 to see if the word was not in use before the admitted appropriation of that word by Safeway in 1926 [R. 143].

During the court's discussion of his doubt as to plaintiff's right to appropriate "Safeway" at all, he said:

"I noticed the other day, Mr. Sterry, after I received this case and was looking at it, there was a

truck going up and down Spring Street, and on the side of it it said Prudential Cleaners. If any name has got a secondary meaning, it is Prudential Insurance Company. Does Prudential Insurance Company preclude anybody in an alien field from using that?" [R. 135.]

Hence, in our trial brief which we filed after the submission of the case we limited our discussion to the right of other retailers to use the name "Safeway". We did so largely because of the above quoted observations of the court and because the record without contradiction showed that the other users of "Safeway" were outside of the retail field. Defendants Exhibit "A" suggests one possible exception. We understand the concern is a very small and insignificant one.

We pointed out that the instant case did not involve a situation such as the court had commented on as to the word "Prudential" appearing on a truck.

While we believe that the plaintiff, as the original appropriator of "Safeway", has the exclusive right to the use of that word, we recognize there may be a difference between the right of a retailer and a non-retailer whose business or occupation cannot in any way be identified with plaintiff's retail sales, using "Safeway" in a corporate or fictitious name. Hence, without conceding the right of anyone else to use the word "Safeway", we took the position in our brief in the court below (largely because of the views the court had expressed as to the use of "Safeway" by non-retailers) that since this case presented the right of another retailer to include the word "Safeway" in the fictitious name under which he did business and to make "Safeway" the dominant word in his advertising, it was unnecessary to discuss the right of the plaintiff to prevent the use of "Safeway" by those not in the retail field, pointing out that the words "North American,"

of course, were words that no one could exclusively appropriate, but that this Court had held in *North American Aircoach Systems, Inc. v. North American Aviation, Inc.* (1955), 231 F. 2d 205, that because of the secondary meaning that had attached to those words in the aviation field the plaintiff could prevent anyone else in that field from using them. We further pointed out that it will be time enough to consider plaintiff's right to prevent someone who is clearly not a retailer, and whose business or services could in no wise be connected with the retail sale of merchandise, from using "Safeway" when a case arises presenting such a situation.

It is certain, however, that the mere fact that a number of other concerns have used the name "Safeway" does not constitute any defense of the defendant's use of it, much less of the defendant's attempt to use it as the sole name of his business in imitation of plaintiff's use of its trade name.

In this connection, we may say that we do not believe that a person in any field can, by the inclusion of "Safeway" in its corporate or fictitious name advertise its business under the name of "Safeway", or make "Safeway" the dominant word in all or any of its advertising.

Certain it is, however, that if other retailers are permitted to so use and advertise their merchandise as "Safeway", plaintiff's trade name will soon be of little, if any, value. Again, the observations of this Court in the *Stork* case, *supra*, 166 F. 2d 348, 357, are most appropriate:

"In *Cleo Syrup Corporation v. Coca-Cola Co.*, 8th Cir., 139 F. 2d 416, 417, 150 A. L. R. 1056, certiorari denied, 321 U. S. 781, 782, 64 S. Ct. 638, 88 L. Ed. 1074, the court declared that 'There is no merit in the contention that a court of equity will not afford protection to the plaintiff's trade-mark or prevent its good will from being nibbled away by unfair competitors.'"

Conclusion.

This is a clear case of a retail merchandiser attempting to trade under and upon the established trade name of another.

While the court found that Safeway was the trade name of the plaintiff with an established secondary meaning throughout the state as indicating only the plaintiff, it found that the plaintiff and the defendant were not in competition, notwithstanding that the court found both were selling furniture. The court based its conclusion that the parties were not in competition upon the fact that by far the larger portion of the plaintiff's merchandise at this time was food products, none of which were sold by the defendant.

The evidence showed that a number of persons during the past thirty years had filed in the County Clerk's office corporate or fictitious names containing "Safeway", but there was no evidence that any of those persons had actually used it or the business they had done, and the evidence without controversy showed that such use, if any, of the word had not affected the secondary meaning in Southern California of "Safeway" as indicating only the plaintiff. Notwithstanding, the court found that the plaintiff was entitled to the protection of its trade name only as to retailers vending articles usually found in grocery stores and food markets, and refused to permit the plaintiff to show what articles were now usually found in such stores.

It is apparent, of course, that assuming the defendant was not in competition with plaintiff,—as he was,—that if he can use the plaintiff's trade name and advertise his goods under it, that all other retailers not selling food can likewise use "Safeway" and advertise their merchandise under plaintiff's trade name. It is undeniable that such general use of plaintiff's trade name would

greatly deplete if not destroy the value of plaintiff's trade name, the present value of which is admitted to be 75 million dollars throughout the nation and approximately 20 to 25 million dollars in California.

To affirm the decree of the court would be to ignore entirely all of the rules as to unfair competition which have been laid down by the decisions of this and the courts of California and of all other jurisdictions, and to totally ignore the mandates of the statutes of California that a trade name is property, and the owner of it can prevent anyone else from using it.

We very respectfully, but with the utmost confidence, submit that the decree of the court below must be reversed with directions to enter an injunction as prayed for by the complaint against the defendant's use in his fictitious name of "Safeway."

All of which is

Respectfully submitted,

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